UNITED STATES

v.

KELLY ARMSTRONG ET AL.

IBLA 98-163 Decided June 18, 1998

Petition seeking permission to file an interlocutory appeal from a ruling of Administrative Law Judge James H. Heffernan, granting in part contestees' motion to limit discovery in a mining claim contest, and a request to stay proceedings below. NMNM 97937.

Permission denied. Request for stay denied as moot.

1. Administrative Procedure: Hearings--Evidence: Admissibility--Hearings--Rules of Practice: Appeals: Hearings--Rules of Practice: Hearings

As a general matter, under 43 C.F.R. § 4.28, permission to pursue an interlocutory appeal will only be granted where the ruling challenged involves a controlling question of law, i.e., a ruling which, if left undisturbed, would necessarily result in a specific disposition of the underlying proceeding.

APPEARANCES: Patricia Leigh Disert, Esq., Office of the General Counsel, United States Department of Agriculture, Albuquerque, New Mexico, for the United States Forest Service; Sarah M. Singleton, Esq., and Galen M. Buller, Esq., Santa Fe, New Mexico, for contestees Kelly Armstrong, Debbie Cantrup, Richard P. Cook and Shirley A. Cook; Karen Hawbecker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for amicus curiae Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By Order dated December 5, 1997, Administrative Law Judge James H. Heffernan granted, in part, a motion filed by Kelly Armstrong, Debbie Cantrup, Richard P. Cook, and Shirley A. Cook (contestees) to limit discovery in mining claim contest NMNM 97937 to information relating to the circumstances, including market conditions, that existed on May 30, 1991. Following issuance of this Order, the United States Forest Service (Forest

Service), Department of Agriculture, requested certification of this Order for purposes of interlocutory appeal as provided by 43 C.F.R. § 4.28. By Order dated January 23, 1998, Judge Heffernan denied this request, relying heavily on this Board's decision in Yates Petroleum Corp., 136 IBLA 249 (1996). The Forest Service thereupon filed a petition with the Board seeking permission to proceed with an interlocutory appeal, notwithstanding the refusal of Judge Heffernan to certify the issue, and also requested issuance of an order by the Board staying further proceedings before Judge Heffernan pending resolution of the Forest Service's petition. Subsequent thereto, the Bureau of Land Management (BLM) filed a request to participate as an amicus curiae in support of the Forest Service. Contestees have duly filed a brief in opposition to the Forest Service's requests. For the reasons provided below, permission to file an interlocutory appeal is denied and the requested stay is denied as moot.

In order to provide a decisional context, we will briefly limn the factual background in which this matter arises. Contestees have located a number of association placer mining claims within the exterior limits of the Santa Fe National Forest. The present contest involves 19 of these claims for which the contestees had, on September 9, 1989, submitted a patent application to BLM based on a discovery of a laundry-grade pumice that was assertedly suitable for and marketed to the garment processing industry. 1/

On January 16, 1991, BLM accepted contestees' payment for the contested claims and issued a First Half Final Certificate (FHFC). More than 2 years later, on October 12, 1993, the Jemez National Recreation Area Act (JNRAA), 16 U.S.C. § 460jjj to 16 U.S.C. § 460jjj-5 (1994), was enacted. All 19 of the claims at issue are within the JNRA. Of importance to the contested claims, the JNRAA provided at 16 U.S.C. § 460jjj-2(a)(1) (1994) that "no patents shall be issued after May 30, 1991." The JNRAA also withdrew all lands within the recreation area from location under the general mining laws. 16 U.S.C. § 460jjj-2(b) (1994).

Following adoption of the JNRAA, a Forest Service geologist examined the placer claims and concluded that, while four of the claims in the patent application were valid (see note 1, supra), the other 19 claims, with the exception of four 10-acre parcels, did not contain a discovery of a valuable mineral deposit because, given the quantity of mineral within the claims in light of other mineral deposits under the control of the contestees, the mineral deposit found on the claims was neither presently nor prospectively marketable due to the excessive amounts thereof.

1/ The patent application originally embraced four additional claims. These claims, the Brown Placer Mining Claims Nos. 9-12, are the subject of an action pending before the U.S. Court of Federal Claims pursuant to 16 U.S.C. § 460jjj-2(a)(2) (1994). See Cook v. United States, 37 Fed. Cl. Ct. 435 (1997).

On January 31, 1997, the Department of the Interior, at the request of the Forest Service, issued a contest complaint seeking to have the 19 claims declared null and void. As specific grounds therefor, the complaint alleged that the minerals found on the claims were not supported by a discovery and that the lands embraced by the claims were nonmineral in character. In the course of preparation for the hearing, the Forest Service served interrogatories on the contestees seeking to discover evidence of new markets and uses for the pumice found on the claims, which evidence it understood contestees intended to present at the contest hearing. In response, contestees filed a motion to limit discovery to evidence regarding the exigent circumstances, including market conditions, that obtained on January 16, 1991, contending that marketability should only be determined as of the date BLM accepted payment and issued the FHFC with respect to the subject claims and citing in support therefor this Board's decision in United States v. Whittaker (On Reconsideration), 102 IBLA 162 (1988).

In his December 5, 1997, Order, Judge Heffernan identified the issue posed by contestees' motion as whether contestees were "required to show marketability of the laundry-grade pumice as of the date of entry only, as advocated by Contestees, or, in the alternative, are Contestees required to show marketability at various times since the JNRAA was enacted, as advocated by Contestant." (Decision at 2-3.) In effect, Judge Heffernan rejected both positions. Relying on Board decisions such as United States v. Collard, 128 IBLA 266 (1994), he concluded that the claimants were required to show marketability as of the date of withdrawal of the land from location (which he interpreted as the retroactive date of the patent ban) and of the date of the issuance of final certificate. Since, in this case, the FHFC had issued on January 16, 1991, while the patent ban had been effectuated retroactive to May 30, 1991, he concluded that no evidence of market conditions would be relevant after the May 30 date, except to the extent that evidence produced covering the post-1991 period would reflect what may reasonably have been anticipated for the post-1991 marketplace. (Decision at 4.)

The Forest Service then sought certification of this question for purposes of filing an interlocutory appeal. As noted above, by Order dated January 23, 1998, Judge Heffernan denied this request. Relying heavily on this Board's decision in Yates Petroleum Corp., supra, Judge Heffernan concluded that his ruling did not involve "a controlling question of law," within the meaning of 43 C.F.R. § 4.28. Notwithstanding Judge Heffernan's refusal to certify his ruling for interlocutory review, the Forest Service filed a request with the Board for permission to proceed with an interlocutory appeal.

While Judge Heffernan's failure to certify the question for interlocutory appeal is not fatal to ultimate consideration of the matter by this

Board, 2/ it does raise the threshold which the Forest Service must surmount to justify review. Thus, as we noted in our Order of March 12, 1998, the Forest Service is required to establish "independent of any question as to the correctness of Judge Heffernan's ruling on the scope of discovery * * * that the refusal of Judge Heffernan to certify the question for interlocutory appeal was an abuse of discretion."

[1] In Yates Petroleum Corp., supra, we reviewed the considerations which properly guide this Board in determining the circumstances under which the Board should grant permission for an interlocutory appeal. Initially, we noted that, for a variety of reasons, interlocutory appeals are generally viewed with disfavor. We pointed out that they are disruptive to the orderly processing of appeals both by the Board and the Hearings Division, that they have the undesired result of tending to undermine the authority of the administrative law judge, and that they may, in fact, actually retard rather than advance ultimate decision-making. Id. at 250-51. We emphasized that it was in light of these considerations that the regulations "severely" limited interlocutory appeals "only to questions of controlling law whose proper resolution would materially advance final decisionmaking." Id. at 251.

More particularly, we expressly held that permission to proceed with an interlocutory appeal should not be granted for the purpose of reviewing a purely evidentiary ruling of an administrative law judge. Rather, based on our analysis of 43 C.F.R. § 4.28 in conjunction with our decisional precedents, we concluded that interlocutory review is only available where either the issue involved is the interpretation of a prior order of this Board remanding the case for a hearing (which the Board would, of course, be in the best position to provide) or, alternatively, an evidentiary ruling which subsumed the determination of "a controlling issue of law." Id. at 251. We did not, however, explicate at any length on meaning of the phrase "controlling issue of law." And it is the scope of this concept on which resolution of the instant appeal turns.

A review of the submissions by both the Forest Service and BLM clearly shows that these agencies construe the phrase as encompassing any issue of law which might be controlling. This is not correct. What the regulation has reference to is a determination by an administrative law judge which, if left undisturbed, would necessarily result in a specific disposition of the underlying proceeding. The difference between this standard and that advocated by the Forest Service and BLM can be demonstrated in the context of this appeal.

Thus, the Forest Service and BLM argue that, because of Judge Heffernan's ruling, the Government would be foreclosed from showing that

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2/ Nor, for that matter, does the mere fact that an administrative law judge has certified a matter for interlocutory review guarantee that the Board will accept the case. Thus, in Yates Petroleum Corp., supra, the Board declined to grant permission to proceed with an interlocutory appeal even though Judge McDonald had certified the question to the Board.

the subject claims contain minerals which are not marketable as of the date of the hearing and, therefore, this ruling improperly constrains the Secretary's delegated authority to safeguard the public lands from invalid claims and could require him to recognize as valid various claims which should properly be declared null and void. But, even assuming that this characterization of Judge Heffernan's decision is correct, the result which petitioner and amicus decry would only ensue if the evidence submitted at the hearing showed that the mineral on the claims was marketable as of the date of the patent ban and had lost marketability since that time. If, however, the evidence established that the claims were, in fact, lacking in marketability as of the date of the patent ban, these claims would properly be declared invalid, under Judge Heffernan's ruling, regardless of whether or not the minerals disclosed thereon were presently valuable. In other words, nothing in Judge Heffernan's ruling is preclusive of an ultimate finding that all of the subject claims are invalid as alleged in the contest complaint.

Admittedly, the effect of Judge Heffernan's order would be to preclude the Forest Service from submitting evidence that the claim lacks present marketability as of the time of the hearing. But, as we indicated in Yates, the Forest Service may make an offer of proof "sufficient to clarify the substance of the excluded evidence so that the presiding judge and, should an appeal subsequently arise, the Board can readily discern both the relevance and materiality of the proffered material." Id. at 252. Should it ultimately become necessary for the Board to determine the underlying correctness of Judge Heffernan's December 5, 1997, Order, the Board could then do so in a context in which it is sure that the issue bears a dispositive relationship to the appeal.

If, on the other hand, the Board were to accept the implicit argument of the petitioner and amicus that an interlocutory appeal properly lies whenever a ruling which might be ultimately dispositive is challenged, the Board would be opening the floodgates to an eventual inundation of interlocutory appeals. Every evidentiary ruling, even on questions of relevance and materiality, necessarily partakes of the potential to be dispositive, since all evidence is presumably tendered for the purpose of establishing facts essential to the party's theory of the case. Virtually every ruling of an administrative law judge would thus be subject to interlocutory review and the Board would inevitably be cast in the role of a supervising umpire, called upon to second-guess every disputed ruling, to the great disruption of both the Hearings Division and this Board's own docket.

We recognized in Yates that cases might arise in which, by declining to entertain an interlocutory appeal, the Board would necessitate the holding of a second hearing. But we also noted that this unfortunate result is counterbalanced by the reality that by limiting the consideration of interlocutory appeals to those cases in which the ruling of the judge necessarily impels a result we also "limit the disruptions to a significantly fewer number of cases than a procedure which allowed immediate recourse to the

Board whenever a party felt aggrieved by an evidentiary ruling of an Administrative Law Judge." Id. at 253. In view of the foregoing, we cannot find that the failure of Judge Heffernan to certify this ruling for interlocutory review was an abuse of discretion. Accordingly, we must decline to grant permission for the requested interlocutory appeal. As a corollary, we also deny the request to stay proceedings before Judge Heffernan.

It should go without saying, of course, that nothing in this decision should be read as precluding the Forest Service from challenging Judge Heffernan's ruling before this Board in any subsequent appeal from a dispositive decision. Nor should anything in this decision be interpreted as either approving or questioning the substance of Judge Heffernan's order. We express no views as to the correctness of that Order, whatsoever.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the petition seeking to file an interlocutory appeal and petition for stay are denied.

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James L. Burski
Administrative Judge

I concur:

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C. Randall Grant, Jr.
Administrative Judge